their transgression by the state governments. "Congress...[in] submitting the first section of the Fourteenth Amendment to the states... ma[d]e the Bill of Rights...binding upon or applicable to the states." Black, J. dissenting in *Adamson v. California*, 332 US 46, 71, 71 Law Ed 1903, 1909.

Until the Fourteenth Amendment, citizens had to look to their state government and to their state constitutions to find local constitutional protections. see *Baron v. Baltimore*, 7 Pet (US) 248, 8 Law Ed 672. Throughout the twentieth century it came to be understood that the due process clause of the Fourteenth Amendment was absorbing most if not all of the Bill of Rights. 16 CJS Constitutional Law Sec. 951. However in Justice Black's view what the court had done under the guise of evolving higher standards through the enlightenment of good conscience was to create an accordion recognizing for times rights not provided for in the document only to discard them, nullifying the very Bill of Rights the constitution had created and imperiling not only the original intent but paralyzing liberty itself, (Black, J. concurring in *Rochin v. California*, 342 US 165, 177, 96 Law Ed 165, 193, 72 Sct. 205) creating a state of impermanency, (*Duncan v. Louisiana*, 391 US 145, 146, 20 Led 2d 491, 507, 88, SCT. 1444) in which an erratic watered down version of the Bill of Rights was administered over the states. see Anno, *Bill of Rights in State Courts*, 18 Led 2d 1388.

With applicability of the Seventh Amendment to the states, the jury function to determine the facts would be secured. *Rogers v. Missouri PR Co.* 352 US 500, 509, 1 LEd 2d 493, 501, 77 Sct. 443; *Webb v. Illinois Central RR.*, 352 US 512, 513, 1 LEd 2d 503, 505, 77 SCT. 451; *Wilkerson v. McCarthy*, 336 US 53, 62, 93 Law Ed. 497, 504, 69 Sct. 413; *Michaelic v. Cleveland Tankers*, 364 US 325 5 LEd 2d 20, 81 Sct. 6.

CONCLUSION

This court should grant the petition for a Writ of Certiorari.

Dated:
Ronkonkoma, New York

Yours etc.,
JOHN F. CLENNAN, ESQ.
Attorney for Petitioners
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Supreme Court of the State of New York –
County of Suffolk : Civil Term : Part 31

----------X

RAYMOND RUSCITO, SR., MARTHA RUSCITO, CONSUMER LAWNMOWER & COAL COMPANY, INC., and CONSUMER SALES, INC.,

Plaintiff,

-against-

Index No.
20404-00

SWAINE INC., JOHN SWAINE, ADAM W. EBERHARDT, ERNEST MARTIN EBERHARDT, WILLIAM EBERHARDT, PYGMY HOLDING CORP., and the TOWN OF SMITHTOWN,

Defendant.

----------X

April 21, 2004
Central Islip, New York

BEFORE: HONORABLE ROBERT A. LIFSON
SUPREME COURT JUSTICE

APPEARANCES:

ADAM B. GROSSMAN, ESQ.
Attorney for the Plaintiffs
120 Court Street
Riverhead, New York 11780

KEVIN FITZGERALD, ESQ.
Attorney for Swaine
542 North Country Road
St. James, New York 11780

CAMPBELL AND MILLER, ESQS.
Attorneys for Eberhardt & Pygmy
94 Maple Avenue
Smithtown, New York 11787
BY: EDWIN MILLER, ESQ.

MINUTES OF TRIAL

HANNELORE WEISS, RPR
Official Court Reporter

THE CLERK: Continued trial.

THE COURT: At this juncture of the trial the plaintiff has rested and both defendants have moved to dismiss their complaint, asserting that the plaintiff has not established a prima facie case for the nuisance that is alleged.

The subject complaint in pertinent part is predicated initially on two causes of action; the second cause of action is no longer pertinent because it involved the Town of Smithtown, so we're dealing only with the first cause of action.

And while it is couched in the language of the conspiracy between the two defendants, as I've indicated in private, now stated on the record, it is my obligation to give a

liberal construction to the pleadings and I think the conspiracy is not and cannot be under the laws of the state as separate, an independent tort, and is merely very beneficial which indicates that the plaintiff is seeking compensation for what he believes to be a nuisance.

Significant are the pertinent allegations of the complaint and I'm going to read them at length so there is no confusion what the gravamen of plaintiff's upsetment with the defendants' conduct is.

Paragraph 18 says, while the plaintiffs were a tenant of a portion of 316 Smithtown Boulevard, and both prior to and after the transfer of title and termination of the landlord tenant arrangement of a small portion of 316 Smithtown Boulevard, defendant, Adam Eberhardt, Ernest Eberhardt and William Eberhardt, Pygmy Holding, Corp. Swaine Inc. and John Swaine conspired to cause financial harm to plaintiffs by blocking the view of plaintiffs business property and creating a private nuisance.

That allegation is denied and that's one of the basis for the trial.

Paragraph 19 alleges the private nuisance created by the said defendant which covered a period of more than ten years including the present time on real property located at 316 Smithtown Boulevard, Town of Smithtown, including, among other things, placing an ice machine, piles of snow in the winter, piles of dirt throughout the year, scattering dumpsters, placing piles of garbage and buses and other motor vehicles on their property at such a location as to block the view of the business of plaintiff's to potential customers who travel by car on Smithtown Boulevard, and by creating such an

objectionable visual blight on the site directly adjacent to plaintiff's business property, so plaintiff continually and repeatedly lost business as a direct result of defendants' creation of a continuing private nuisance, despite plaintiff's repeated requests that the above defendant cease the private nuisance. Even when title transferred, the private nuisance created by the defendants continued without interruption. That allegation was also denied.

And paragraph 20 states as follow: That on or about July 1st, 2000, defendant Swaine Inc. by defendant John Swain erected a fence along the perimeter of the property at 316 Smithtown Boulevard, Lake Ronkonkoma, New York, which further blocked the view of plaintiff's business from potential customers.

Prior to the commencement of the trial which was sent from the trial assignment part for all purposes, the Court unilaterally bifurcated the trial. By that I mean, I required the plaintiff to first establish a basis for the nuisance before entertaining any testimony for this jury about damages. In so doing, the Court notes that it has been established that during the discovery process, there was a demand for witnesses and interchange and response to that demand.

Nowhere in response to the demand was an expert in the field of damages or someone who could testify as to the potential diminution of the market value in the premises of the business damages set forth. And so the plaintiff really received a windfall because if the jury were to find that there was a nuisance, they would have time to rectify what would almost be irremedial error basis for the defendants to take an appeal.

I make that observation that that's not part of this

decision.

The complaint significantly omits any allegation that the complaint action in any way diminished or adversely affected the residence that also were contained on their property. And during the course of the trial at several instances where such testimony as attempted to elicited, the Court excluded that testimony because it did not comport wit the allegation of the complaint.

And so what we're faced with is, has a prima facie case been established based on the commercial properties that are involved here? The motion to dismiss, after the plaintiff has presented their case, the Court is constrained to apply every inference possible to the plaintiff because it's up for the jury to decide and the Court can only take it away from the jury if I come to the conclusion that based on what has been established, that no rationale juror could find for the plaintiff. In this case, therefore, whether I agree with it or not, it is possible, and, therefore, it must be conceded that it is going to be established that the plaintiff has met their burden with respect to establishing that the defendants caused an icebox to be on their property, mounds of dirt, fence, buses, delivery trucks, snow and other debris, all the things that are alleged in the complaint. And it is also - - even though it wasn't proved in a manner that I might agree with, but it's possible, based on the photographs for the jurors to conclude that all those items did obstruct the visibility of plaintiff's business from Smithtown Boulevard.

The question that the Court asked to determine that do those facts, as a matter of law, constitute a nuisance or stated in another way as a matter of law or are they not nuisance.

To that, I'm going to quote at length from the Patter Jury Instruction, the treaties contained starting with page 121: The essence of private nuisance is interference with the use and enjoyment of land.

I'm going to omit all the citations because they are too numerous. And so I'm just going to read the language, quite is from PJI in connection with pages 121 through 124: The essence of private nuisance is interference with the use and enjoyment of land. It differs from trespass in that there need be no interference with possession, although some acts interfere with both possession and use and enjoyment and thus constitute both nuisance and trespass. The element of the tort of private nuisance are, (1) an interference, substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with plaintiff's right to use and enjoy land, (5) caused by defendant's conduct.

The burden of proof is upon the plaintiff to establish all elements of the unreasonableness of the interference. The interference may take the form of (1) damage to plaintiff's land buildings or vegetation, (2) annoyance, inconvenience or discomfort to one who has the necessary property interest, or (3) the threat of future substantial damage to plaintiff's property. The interference must be substantial, not trifling, material and actual not fanciful or sentimental. The standard by which substantiality is measured is whether the situation would disturb the physical comfort of normal persons in the community. It's not whether the plaintiff because of an illness or idiosyncrasy has in fact been discomforted, even though his or her illness is such that continuation of the nuisance may result in the plaintiff's death. While duration or frequency or recurrence bears on the issue of reasonableness, the fact that

the injury is only occasional, involves a single instance of damages is not conclusive on the issue of substantiality. Intent may consist of a malicious desire to do harm as when spite fence is erected, but does not require a desire to do harm. An invasion of another's interest in the use and enjoyment of land is intentional when the defendant acts for the purpose of causing it or knows that it is resulting from the defendant's conduct. In such instances, as each of the cases cited in this paragraph holds, negligence is not an issue, the only further question being whether defendant's conduct is unreasonable.

Parenthetically in this case it's alleged both intentional tort and negligence I'm going to construe the plaintiff's pleading that way, and my comments are equally applicable to both to intent and negligence.

Reasonableness is sometimes a question of law but generally is a question of fact. The law of private nuisance is a matter of degree and involves a balancing of interests. No one may make an unreasonable use of his or her property to the material injury of a neighbor's, but that does not mean that property may never be used as to do injury to a neighbor. Persons living in organized communities must tolerate some damage, annoyance or inconvenience from each other. They are compensated by the advantages of civilized society. Whether the use by defendant of his or her property is a nuisance requires the weighing of the gravity of the harm to plaintiff against the utility of and necessity for defendant's conduct. Following are some of the factors, no one of which is conclusive, that must be considered in determining whether defendant's use is reasonable under all the circumstances: Location of the properties, priority of use, nature of use, public utility, character of the neighborhood, extent and frequency of the injury, the effect on the enjoyment of life, health and

property, duration of the harm, contingent nature of the injury, based on all those factors, the general rule leaves a lot of room for the application to specific cases. And so I turn now to what other courts have done faced with similar circumstances.

In instances where properties been used and has given off offensive orders and substantial noise, courts have held that is not private nuisance that it is in the Matter of Chenango Inc. versus County of Chenango, 256 A.D.2d 793, where a cement factory was adjacent to a residential area and the ensuing dust and noise led to intolerable circumstances. The Appellate Division of this Department has said that as a matter of law such circumstances did not constitute private nuisance. That is the Matter of Benjamin versus Nelstad Materials Corp. 214 A.D.2d 632, and while it's possible that viewing in related area of the law that being of condemnation the right that flow therefrom in which people get compensation when the State takes certain property right of way to their detriment, that gives some guidance to this case at hand. And it's possible that your right to have a view was scenic view of the property and when that is lost that is compensable and would constitute something that could be protected. And the Court has held that in the matter of Keinz versus State of New York, 2 A.D.2d 415. However, the right to view out while is compensable, there is emphatically no right to view in. There is no recognizable property right to have an unobstructed view of your property whether from a main street or from a side street. And that is found by decision of our Court of Appeals, the highest Court in the State, and that's in the matter of Acme Theaters versus State of New York. And that is 26 N.Y.2d 385. The very thing which forms the basis of the gravamen of plaintiff's complaint is the very thing that the Court of Appeals indicated can never be compensated. And that particular case had to do with a drive-in-movie in which the site lines from the highway altered

the visibility of the theater. Somewhat similar to that we have here. And the Court of Appeals noted, however, there is no right to be located adjacent to public highway or to have traffic pass by one's property. Our courts have consistently refused to ward conventional damages because owner's property is no longer visible to passing motorist.

Based on that judicial precedent, as well as cases that have rendered in support of that, notable Feris versus State of New York, 24 A.D.2d 661, which holds similar that obstruction of view is not compensable. It appears that the defendant's motion must be granted. There is no basis on the facts here where a rational jury can make any award in favor of these plaintiffs, and so holding, the Court notes that the fact unassailable, that the property was commercial in nature, that the plaintiffs established that they knew before that there was commercial establishment the way the property were situated, it is conceivable that the defendant could have made other use of their property even construct buildings or put any unlawful use to it that they desired that would have completely obscured the business visibility of the plaintiff's parcel from the main street in question with commercial traffic.

I also note that the plaintiff's proof was deficient in it's ability to link that which they complained of to what they allege was caused. There are many potential alternate causes for loss of business, and that walk in, traffic in and of itself cannot be gravamen of, there is other ways to create advertising and to attract people to one's business location. Because it is commercial property and not residential property, it is somewhat critical in this case because they were not deprived of the use of their property or enjoyment of it. The property was primarily to generate income, and that ability to utilize it in that fashion was never affected by the obliteration of

visibility from the street which they had no right to and the petition would continue in duration. That constitutes the decision of the Court pursuant to CPL 4213. I'm going to discharge the jury. The exception of the aggrieved party is noted. They can preserve their right to appeal. If anyone may comment they are free to do so.

MR. FITZGERALD: I wish to thank the Court on behalf of the client for its patience and indulgence in this case.

MR. MILLER: Likewise, your Honor, thank you.

MR. GROSSMAN: I also would like to thank the Court for this matter.

MR. RUSCITO: I would like to address the Court as plaintiff; basically, I owned that property for 30 years and that location is the central hub of the Nesconset area, and it has hurt the neighborhood numerously over the years. We hadn't proved this case according to your ruling, but I suppose that in the future, hopefully, we will have enough proof to change the site to a more public agreeing type situation. Thank You.

THE COURT: Enter settlement based on the transcription. And I think that's the most appropriate way to proceed. Make arrangement with the Court reporter.

(Concluded)
(Concluded)

* * *

Certified to be true and accurate record of the
proceedings herein

s/

HANNELORE WEISS, RPR
Official Court Reporter

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D6388
Y/mv

___AD3d____ Argued - March 15, 2005

THOMAS A. ADAMS, J.P.
SONDRA MILLER
STEPHEN G. CRANE
WILLIAM F. MASTRO, JJ.

2004-08568
2004-10702 DECISION & ORDER

Raymond Ruscito, Sr., et al., appellants,
v. Swaine, Inc., et al., respondents.

(Index No. 20404/00)

John F. Clennan, Ronkonkoma, N.Y. for appellants.
Campbell & Miller, Smithtown, N.Y. (Edwin Miller of counsel), for respondents.

In an action to recover damages based on an alleged private nuisance, the plaintiffs Raymond Ruscito, Sr., and John Swaine appeal from (1) a judgment of the Supreme Court,

Suffolk County (Burke, J., at judgment; Lifson, J.,at trial) entered on September 28, 2004, which, upon an order of the same court (Lifson, J.) dated April 21, 2004, granting the defendants' motion to dismiss the complaint, made at the close of the plaintiffs' case, is in favor of the defendants and against them, and (2) an amended judgment of the same court dated November 1, 2004, which, upon the order, was in favor of defendants and against them.

ORDERED that the appeal from the judgment entered on September 28, 2004, is dismissed, as the judgment was superseded by the amended judgment dated November 1, 2004; and it is further,

ORDERED that the amended judgment dated November 1, 2004, is affirmed; and it is further,

ORDERED that one bill of costs is awarded to the respondents.

The Supreme Court properly determined that the plaintiffs failed to adduce legally sufficient evidence that might have justified a verdict in their favor and against any of the defendants prohibited from using or enjoying their property or that defendants exercised unreasonable control over the property. In addition, as the defendants' fence did not interfere with plaintiffs' right to light or air, such allegations did not form a sufficient basis for a private nuisance claim" (*Christenson v. Gutman*, 249 AD2d 805,808; *see* RPAPL 843, 841; *Kolodziej v. Martin*, 249 AD2d 941, 942; *cf. Saperstein v Berman*, 119 Misc 205, 207).

There is no merit to the plaintiffs' argument to the extent that it rests on the premise that the mere presence, on the

adjoining property, of unsightly dumpsters, an abandoned icebox, "automobile hulks," or a "hideous rampart of dirt," without more, would give rise to a valid cause of action on a theory of private nuisance (*see Dugway, Ltd. v. Fizzinoglia,* 166 AD2d 836, 837; 81 NY Jur2d, Nuisances, section 33). "Things merely disagreeable, however, which simply displease the eye no matter how irritating or unpleasant, are not nuisances" (*Dugway, Ltd. v Fizzinoglia, supra,* quoting 81 NYJur2d § 17 at p. 362; *see Valley Courts v Newton,* 47 Misc 2d 1028; *Metropolitan Life Ins. Co. v Moldoff,* 187 Misc. 458, 460, *aff'd* 272 AD 1039, *see also Demarest v Hardham,* 34 NJ.Eq. 439). There is similarly no merit to the plaintiffs' argument that a cause of action alleging private nuisance may be asserted merely because the presence of certain structures on their neighbors' property might render their own property less conspicuous from the roadway (*see generally Acme Theatres v State of New York,* 26 NY2d 285, 290).

Accordingly, the amended judgment is affirmed. ADAMS, J.P., S. MILLER, CRANE and MASTRO, JJ., concur.

ENTER:

s/
James Edward Pelzer
Clerk of the Court

Court of Appeals

At session of the Court, held at Court
of Appeals Hall in the City of Albany
On the twenty-ninth day
Of June 2005

Present, Hon. Judith S. Kaye, Chief Judge, presiding.

2-10 Mo. No. 464
Raymond Ruscito, Sr., et al.,
Appellants,

v.
Swaine, Inc., et al.,
Respondents.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellants herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

s/
Stuart M. Cohen
Clerk of the Court

State of New York
Court of Appeals

Stuart M. Cohen
Clerk of the Court

Clerk's Office
Albany, New York 12207-1095

DECISION June 29, 2005

Motion for leave to appeal denied.

2-10 Mo. No. 464

Raymond Ruscito, Sr., et al.,
Appellants,

v.

Swaine, Inc., et al.,
Respondents.